

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

PRIMEFLIGHT AVIATION SERVICES, INC.)	
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Employer,)	
)	NLRB CASE NO.: 02-RC-186447
and)	
)	
INTERNATIONAL BROTHERHOOD OF)	
ELECTRICAL WORKERS, LOCAL 1430)	
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Petitioner)	
_____)	

**EMPLOYER’S REQUEST FOR REVIEW OF DECISION AND
DIRECTION OF ELECTION AND BRIEF IN SUPPORT**

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PRIMEFLIGHT AVIATION SERVICES, INC.

Employer

and

CASE 02-RC-186447

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1430**

Petitioner

**EMPLOYER’S REQUEST FOR REVIEW OF REGIONAL DIRECTOR’S
DECISION AND DIRECTION OF ELECTION**

In accordance with Section 102.67(c) of the National Labor Relation Board’s Rules and Regulations, PrimeFlight Aviation Services, Inc. (“Employer” or “PrimeFlight”) hereby submits this Request for Review of the Regional Director for Region 2’s Decision and Direction of Election (“DDE”) dated November 4, 2016 rejecting PrimeFlight’s position that it is a derivative carrier subject to the jurisdiction of the National Mediation Board (“NMB”) pursuant to the Railway Labor Act (“RLA”). Moreover, the Regional Director rejected PrimeFlight’s reasonable, alternative position that the matter should, at the very least, be referred to the NMB, the agency with expertise in determining derivative carrier status.

I. STATEMENT OF POSITION

This matter arose out of a petition for representation filed by the International Brotherhood of Electrical Workers, Local 1430 (“Petitioner” or “Union”) on October 19, 2016 seeking to represent all full-time and part-time baggage handlers, wheelchair agents, and line queue agents employed by PrimeFlight at the Westchester County Airport (“Airport”), excluding all other employees, sky caps, clerical employees, guards and supervisors as defined by the

National Labor Relations Act (“NLRA”). The only issue presented at the October 27 hearing is whether the Board has jurisdiction over PrimeFlight. As the Regional Director notes in her DDE, attached hereto as Exhibit 1, the jurisdictional issue is the identical issue presented just over a year ago in Case 02-RC-158251, a matter involving the same parties and the same location. The Regional Director accepted the parties’ stipulation to the evidence in that earlier case.¹

The Regional Director recognized in the DDE that in analyzing jurisdiction, a two-part test is applied to determine whether an employer who does not fly aircraft for the transportation of freight or passengers is nonetheless a carrier subject to the RLA: “First the NMB determines whether the nature of the work is traditionally performed by employees of rail or air carriers. Second, the NMB determines whether the employer is directly or indirectly owned or controlled by, or under common control with, a carrier or carriers. (DDE at 2). *See, e.g. Aircraft Services Int’l, Inc.*, 352 NLRB 137, 139 (2008); *Evergreen Aviation Ground Logistics Enterprises, Inc.*, 327 NLRN 869, 869 n.1 (1999); *ServiceMaster Aviation Services*, 325 NLRB 786, 787 (1998).

As to the first part of the test, the Regional Director accepted the parties’ stipulation that the work performed by PrimeFlight at the Airport for its customers JetBlue and AVPORTS is the type of work traditionally performed by employees of carriers. (DDE at 3). However, the Regional Director incorrectly found that the testimony and evidence PrimeFlight presented detailing the nature of carrier control exerted over PrimeFlight employees was insufficient to satisfy the second part of the test to establish jurisdiction under the RLA.

¹ References herein to the transcript (TR ____), exhibits (Ex ____), and stipulated facts are to the record in 02-RC-158251.

The control test focuses on the role that the carriers play in the company's daily operations and its effect on the manner in which the employees perform their jobs. See, e.g. Quality Aircraft Services, 24 NMB 286, 291 (1997). The following factors are often considered in determining whether sufficient carrier control exists:

- (1) control over the manner in which the entity conducts its business;
- (2) access to the company's operations and records;
- (3) role in hiring, firing and disciplining the company's employees;
- (4) degree to which carriers supervise the entity's employees and/or otherwise affect conditions of employment; and,
- (5) control over employee training.

See Automobile Distribution of Buffalo Inc. and Complete Auto Network, 37 NMB 372, 378 (2010); *Signature Flight Support of Nevada*, 30 NMB 392, 400 (2003). Importantly, it is not necessary for each of these factors to be presented for the control test to be met and thus for a company to be found subject to the RLA. Indeed, in most – if not all – of the cases in which sufficient control has been found, at least some of these factors have not been present.

In finding that the evidence of carrier control over PrimeFlight employees at the Airport was insufficient to establish RLA jurisdiction, the Regional Director ignored or misinterpreted critical stipulated facts, attached hereto as Exhibit 2, as well as facts developed on the record in Case 02-RC-158251. Additionally, Petitioner did not call a single witness and provided no evidence to rebut PrimeFlight's evidence and witness testimony. As a result, PrimeFlight respectfully requests the Board review the DDE and conclude that the NMB has jurisdiction over PrimeFlight, or alternatively that it refer this matter to the NMB for an advisory opinion regarding PrimeFlight's status as a derivative carrier under the RLA.

I. STATEMENT OF FACTS

A. JetBlue controls the manner in which PrimeFlight conducts its business

The facts and evidence establish substantial carrier control over the manner in which PrimeFlight conducts its business.² PrimeFlight's operations at the Airport are governed by its contracts and service agreements with JetBlue and AvPorts. The contract with JetBlue covers skycap, wheelchair, and baggage services. The contract with AvPorts covers curbside baggage handling, wheelchair services, security monitoring and ancillary services for all other airlines at the Airport, including U.S. Air, Delta, American, and United . DDE at 3.

1. JetBlue controls the PrimeFlight employee schedules and hours

PrimeFlight employee work schedules are determined based on (1) the flight schedules provided by JetBlue and AvPorts; and, (2) daily lists provided by JetBlue and the other airlines, of passengers who will need wheelchair assistance for each flight throughout the day. DDE at 3.

In addition to the schedules, JetBlue provides PrimeFlight, JetBlue also regularly communicates its concerns and instructions about staffing to PrimeFlight management. For example, Matthew Barry, PrimeFlight Division Vice President, testified about an email he received from JetBlue General Manager John Palarmo dictating PrimeFlight's "priorities" and expressing his "concern during the Thanksgiving holiday travel season" about PrimeFlight's deficient "staffing head counts." As Palarmo stated in his email:

I am very concerned about the PrimeFlight staffing over the weekends, in particular tomorrow, 11/30, as it will be a peak travel day. While we are unable to obtain an exact staffing headcount for tomorrow, we are being guided... that there will only be approximately 4 to 5 PrimeFlight employees (this includes the on-duty supervisor). The staffing tomorrow

² All of the stipulated facts demonstrating carrier control over PrimeFlight operations at the Airport apply to JetBlue and Afco AvPorts Management, LLC ("AvPorts"). TR at 26, 27.

hardly seems like enough to manage the entire airport community's wheelchair needs.

First Priority – staffing for tomorrow 11/30. Sunday is the second busiest travel day, after the day before Thanksgiving, and we are at 99% average load factor across all flights (inbound and outbound).

Ex 3

JetBlue also instructs PrimeFlight on a day-to-day basis about the number of hours it needs. In that respect, Barry testified:

Say we got 60 hours for the day, and it was a two-shift operation, [JetBlue] might say, okay, we want it split 50/50. We want 30 hours in the morning, 30 hours in the afternoon. [JetBlue] might come and say, you know what, we're giving you 60 hours today, but really we see the need as being more on the afternoon shift, so we want you to use 40 hours of that time on the afternoon shift and 20 in the morning. So based on that, we then work backwards into a headcount number that provides them with the heads that they're looking for on that particular time, which still works within the hours they've allotted to us or allocated to us.

Tr at 114-115.

JetBlue and AvPorts at times request PrimeFlight provide additional hours of work to provide service during busy travel times or to accommodate the airlines' varying schedules. (DDE at 4) Moreover, PrimeFlight must get permission from JetBlue before exceeding the contractual maximum daily number of service hours to be worked by PrimeFlight employees.

2. JetBlue controls records that PrimeFlight must maintain and JetBlue has access to those records

As further evidence of its control over PrimeFlight operations, JetBlue and AvPorts require PrimeFlight maintain and provide them with access to PrimeFlight records. (Ex. 2 at 2; DDE at 4) In that respect, PrimeFlight is required to provide the carriers with: 1) regular reports showing the number of wheelchair transactions to ensure that PrimeFlight is meeting JetBlue's

customer wheelchair demands; and, 2) copies of the training records associated with JetBlue-required initial and recurrent training; 3) copies of all documents regarding workplace accidents and injuries, employee grievances, and employee disciplinary actions. (TR at 176 - 178; Ex. 2 at 2). The requested training records are for Jet-Blue required training of JetBlue rules, policies and procedures. (Tr at 177) Moreover, both JetBlue and AvPorts have the right to audit any PrimeFlight's records, when the audit is directly related to the services provided. (DDE at 4; Ex. 2 at 2).

3. JetBlue and AvPort control over PrimeFlight personnel decisions

PrimeFlight provided testimony and evidence that JetBlue has the authority to remove, at any time, any PrimeFlight employee that JetBlue does not want to continue working at the Airport. In that respect, Article 18.1.5 of the General Terms Agreement for Services between PrimeFlight and JetBlue provides, in relevant part, as follows:

JetBlue reserves the right to require removal by [PrimeFlight] from JetBlue's aircraft or airport facilities of any [PrimeFlight] employee unacceptable to JetBlue, provided, however, that JetBlue will not exercise this right on unlawful grounds.

(Ex 4)

Matthew Barry, PrimeFlight Division Vice President, testified about the application of this provision:

- Q. So Mr. Barry, how has this provision been applied, in your experience?
- A. I know of two situations in White Plains and I know of other scenarios in other airports where this particular provision with JetBlue, as well as other carriers that have similar provisions in their general terms agreements, where they have exercised that right and requested employees to be terminated and/ or removed from our contracts.

TR at 19

In 2013, PrimeFlight, at the instruction of JetBlue, terminated its employee Mark Dushaj. Specifically, Barry testified about an email he received on September 30, 2013 from Anthony LoCastro, JetBlue General Manager. LoCastro notified Barry of his intent to demand the termination of PrimeFlight employee Mark Dushaj who had threatened a JetBlue employee that he would “hurt her with is tools.” (DDE at 5). The email from LoCastro to Barry states, in pertinent part, as follows: “In addition it seems we have a PrimeFlight employee that I will be requesting [PrimeFlight] to terminate as he has made a threat to one of my employees.” (Ex 5).

After receiving the email from LoCastro, Barry contacted Albert Tejeda, PrimeFlight General Manager, to convey the “severity of the scenario [and] the requirement as part of [PrimeFlight’s] contract and agreement with JetBlue that [LoCastro] has the right to remove employees and terminate them.” Barry further testified that as a result of LoCastro’s email, he “[t]old [Tejeda] to process the termination with HR.” (Tr at 60). Barry testified that “based on [JetBlue’s] ability in the contract... to remove at any time, anyone that they did not want... the employee was ultimately terminated” (Tr at 22, 23). When asked by the Hearing Officer whether an investigation was conducted before terminating Dushaj, Barry responded

[u]nfortunately not. I mean, it’s – because of the contractual language that we have with [JetBlue], it’s not like the customer says open up an investigation and let me know how it works out. You know, the customer has language in there, it’s in there for a very specific purpose for them to action if they feel that it’s warranted.

Tr at 64.

Consistent with Barry’s testimony, Tejeda testified that he spoke with LoCastro about the incident as well, and that LoCastro stated:

Listen, I can’t have this [Dushaj] work for me, I can’t have this guy work for me if he’s going to threaten my employees, especially you know, he’s

going to get a bag of tools from his car and hurt my employee... I don't want this guy working for JetBlue at all... So that's when I, you know, I just ended up doing the termination.

Tr. at 217.

In fact, Tejeda terminated Dushaj at the first opportunity, without conducting an investigation, the very next morning on October 1, 2013. (Ex 6). Tejeda testified to conversation with Dushaj as follows:

So Mark, his normal start time was at – I think around 4:00 p.m.. So I called Mark over to me. I said Mark listen, for what happened last night, the incident when you threatened JetBlue employees. He said, yeah, I did, I threatened one.

I said, well, first of all, you can't do that. And now, that you have done that, you know Anthony [LoCastro] does not want you working on the airport contract for JetBlue, servicing JetBlue, so I have no choice but I have to terminate you...

Tr 219

In 2011, JetBlue notified PrimeFlight about PrimeFlight employee Jimmy Santana who was conducting curbside check-in and had engaged in misconduct by (1) offering a JetBlue customer a \$20 discount and (2) receiving a \$50 cash payment from a customer for an overweight bag and kept the money for himself. (DDE at 5). Upon receipt of the photographs, PrimeFlight terminated the employee. (DDE at 5).

In a third termination incident, in March 2015, AvPorts sent PrimeFlight a photo of a PrimeFlight employee responsible for gate watch duty sleeping on the job. PrimeFlight did not investigate the matter. It terminated the employee. (DDE at 6).

In addition, JetBlue and AvPorts provided PrimeFlight with names of the PrimeFlight employees to be promoted. PrimeFlight implemented its promotions based on the input from JetBlue and AvPorts. (Tr at 197).

4) JetBlue provides the equipment that PrimeFlight uses at the Airport

As provided in the amendment to the parties' General Terms Agreement, JetBlue provides "at its sole cost and expense" the wheelchairs, baggage tags and boarding pass stock utilized by PrimeFlight employees. (Tr at 25; Ex 3). PrimeFlight also has access to computers owned by JetBlue that it can use to retrieve information about passengers who will need wheelchair assistance. (DDE at 3; Ex. 2 at 2). Additionally, AvPorts provides PrimeFlight with an office at the Airport. AvPorts has a key to the office and is free to enter gain access. (DDE at 4).

5) JetBlue exerts control over service provided by PrimeFlight

Both JetBlue and AvPorts report service deficiencies to PrimeFlight, including failing to provide required reports or adequate staffing; neglecting to clean equipment; and, raising concerns about PrimeFlight employees speaking on the cell phones while on duty. (DDE at 4). PrimeFlight's progress in rectifying any such service issues is tracked in an action plan that PrimeFlight provides with regular updates to JetBlue and AvPort management. (Tr. 27 – 36; Ex 7; DDE at 4). PrimeFlight is responsible for addressing the carrier concerns and communicating with JetBlue and AvPorts to ensure that they are aware of PrimeFlight's efforts to improve performance. (TR at 32; DDE at 4). PrimeFlight and JetBlue management also meet weekly to discuss, among other things, PrimeFlight's progress addressing the action items. (Tr. 44, 45).

Moreover, JetBlue conducts daily briefings with PrimeFlight supervisors to ensure that PrimeFlight employees are providing the necessary wheelchair and baggage services. (DDE at

6). JetBlue instructs PrimeFlight supervisors at these meetings about the daily workload. (DDE at 6). JetBlue has regularly attended PrimeFlight staff meetings and directly addressed PrimeFlight employees about servicing deficiencies. (DDE at 6).

II. ARGUMENT

A. Applicable Law

The “control” analysis is multi-factored, and the NMB has not stated whether any one factor is more probative than the others. However it is clear that it is not necessary for all of these factors to be present for the control test to be met, and in most- if not all- of the cases in which control has been found, at least some factors have not been present. Moreover, it is the carrier’s right to exercise the indicia of control that is critical to the inquiry, even if that right has been exercised only occasionally – or not at all. As the NLRB noted recently in the joint employer context, “the right to control is probative of an employment relationship – whether or not that right is exercised.” *BFI*, 362 NLRB No. 86 (2015) (emphasis added). Here, both the parties’ contracts and their actual practice demonstrates a level of control that far exceeds that which has been sufficient to find derivative carrier status.

Jurisdiction under the RLA has previously been sustained for employers whose operations are similar to PrimeFlight’s. In *Swissport USA, Inc.*, 353 NLRB No. 18 (2008), the Board found the company to be within the jurisdiction of NMB and dismissed the petition based on the following indicia of carrier control:

- dictated the type of training;
- mandated specific performance requirements;
- required regular briefings;

- had the right to request that the employer remove employees from the job; and,
- provided equipment and facilities.

Finding that the above indicia were sufficient evidence of carrier control to establish NMB jurisdiction, the Board relied upon the opinion of the NMB, which provided an advisory opinion reaching the same conclusion. 35 NMB No. 55 (2008).

Another very instructive case is *Air Serv Corp.*, 33 NMB 272 (2006), where the NMB found that Air Serv, a non-carrier owned business, fell within its jurisdiction. The NMB cited the following facts as determinative of carrier control: the carrier's flight schedules affected the work schedules of Air Serv employees; the carrier provided equipment used by Air Serv; the carrier provided many of the supplies used to clean its aircraft; the carrier had access to Air Serv's records regarding personnel and training in order to perform periodic security and safety audits; and the carrier had an extensive set of regulations and standards which governed training and servicing and other aspects of performance under the agreement.

Another case that provides compelling support is *AvEx Flight Support*, 30 NMB 355 (2003). In *AvEx*, the contractor provided document screening, wheelchair and other services to carriers at TF Green Airport in Rhode Island. The NMB found jurisdiction, relying on the following: (1) the contract permitted the carrier to conduct audits, observe the contractor's work in progress, inspect its equipment; (2) the carrier could audit records; (3) carrier flight schedules determined staffing and scheduling; (4) the carriers provided office space; (5) carriers were able to make complaints about employee performance and could request reassignment; and (6) uniforms had to be approved by the carriers (although they were clearly *AvEx* uniforms). *Id.* At 362. The NMB found jurisdiction in spite of the fact that "AvEx hires, determines hours of work,

makes work assignments, provides training on AvEx policies and procedures, keeps personnel records, and provides uniforms for its employees.” *Id.* at 358-59.

B. Analysis of the Factors

The evidence of carrier control over PrimeFlight and its employees is virtually indistinguishable from that in the foregoing cases where jurisdiction was established under the RLA. The evidence presented by PrimeFlight clearly establishes the presence of each of the following factors: (1) JetBlue controls the PrimeFlight employee schedules and hours; (2) JetBlue dictates the training and records that PrimeFlight must maintain, and JetBlue has access to those records; (3) JetBlue and AvPort have control over PrimeFlight personnel decisions; (4) JetBlue provides the equipment that PrimeFlight uses at the Airport; and, (5) JetBlue exerts control over service provided by PrimeFlight.

The Regional Director discounts the evidence of carrier control over PrimeFlight stating that it “is no greater than the typical level of control between a service provider and a customer.” Such a broad brush statement does not hold up under scrutiny.

1. JetBlue Controls the PrimeFlight Employee Schedules and Hours.

PrimeFlight’s schedules and work hours are dictated by maximum number of contract hours allotted to it as well as by the flight schedules and daily wheelchair needs communicated to it by JetBlue and AvPorts. JetBlue communicates and service or staffing deficiencies to PrimeFlight and provides instructions about the need to rectify such concerns. Additionally, both JetBlue and AvPorts can demand PrimeFlight meet specific needs during busy travel times or to accommodate the airlines’ varying schedules.

With far less decisive facts in *Air Serv, supra*, the NMB found that it retained jurisdiction, in part, because the carrier’s flight schedules affected the work schedules of Air

Serv employees. Specifically, the NMB found persuasive in that the service agreement provided stated that Air Serv would

perform the services during the hours designated by United and will, in any event, perform the Services, where possible, in such a manner as to avoid inconvenience to United and its personnel and interference with United's operations.

33 NMB No. 272, 277

The evidence of JetBlue control over PrimeFlight scheduling greatly exceeds the contractual language relied on in *Air Serv*.

2. JetBlue Controls Records that PrimeFlight Must Maintain and JetBlue has access to those records

JetBlue control over the type of training and access to PrimeFlight training records is a significant indicia of the requisite control to establish NMB jurisdiction. In finding otherwise, the Regional Director misguidedly relies on *Huntleigh USA Corporation*, 40 NMB 130, 132-133 (2013). In *Huntleigh*, the employer "developed its own training to comply with federal rules and regulations" and the training was "not dictated by a carrier." By contrast, JetBlue does provide the material and dictate the type of training PrimeFlight is required to administer to PrimeFlight employees. On similar facts, the NMB in *Air Serv Corp*, supra, found such access evidence of significant control. The Regional Director's reliance on *Huntleigh*, therefore, is misplaced.

3. Control over Equipment

Ownership of facilities and equipment utilized by the entity's employees is also relevant in determining whether a carrier has control over the entity's employees for purposes of jurisdiction under the RLA. In this case, AvPorts provides PrimeFlight offices at the airport at no

cost. In addition, JetBlue provides PrimeFlight equipment including wheelchairs, baggage tags, boarding pass stock, check-in system, desk and printers. Ex. 4.

Although the DDE barely addresses carrier control of office space and does not even acknowledge carrier control over equipment, such evidence was relevant in the NMB's determination that it, not the NLRB, had jurisdiction in *Air Serv Corp.* supra.

4. JetBlue and AvPort control PrimeFlight personnel decisions

With respect to JetBlue control over personnel decisions, the unrebutted and consistent testimony of PrimeFlight's witnesses Barry and Tejeda conclusively establish that JetBlue made the decision to terminate PrimeFlight's employee Mark Dushaj. In that respect, Barry testified that pursuant to Article 18.1.5 of the General terms agreement, JetBlue General Manager LoCastro emailed him on September 30 notifying of his desire to have PrimeFlight terminate Dushaj, for threatening a JetBlue employee. Barry testified that he then contacted Tejeda to convey the "severity of the scenario" and given the above contract provision "to process the termination with HR." In fact, in direct contrast to the assertion in the DDE that PrimeFlight investigated the matter before terminating Dushaj, Barry specifically answered the Hearing Officer's question as to whether an investigation was conducted in the negative, stating:

[u]nfortunately not. I mean, it's – because of the contractual language that we have with [JetBlue], it's not like the customer says open up an investigation and let me know how it works out. You know, the customer has language in there, it's in there for a very specific purpose for them to action if they feel that it's warranted.

Tejeda corroborated the fact that PrimeFlight simply followed the JetBlue instruction to terminate Dushaj, stating that LoCastro told him "I can't have this guy work for me if he's going to threaten my employees..." he simply met with Dushaj the next day and told him that LoCastro did not want him working at the airport so he had "no choice" but to terminate him.

Moreover, the Regional Director simply ignored the un rebutted testimony of Tejada that JetBlue and AvPorts provided PrimeFlight with the names of the PrimeFlight employees to be promoted and that PrimeFlight implemented its promotions based on that input. The testimony and evidence presented here is significantly more compelling than was presented in *AvEx Flight Support*, supra, where the NMB found jurisdiction, relying in part on the fact that carriers were able to make complaints about employee performance and could request reassignment. As the above facts demonstrate, JetBlue exercised much greater control over PrimeFlight personnel decisions.

CONCLUSION

JetBlue and AvPorts have exercised direct control over firing and promotions of PrimeFlight employees. They effectively set staffing levels, employee scheduling, performance expectations, and other matters. JetBlue controls the training provided to PrimeFlight's employees and trains PrimeFlight personnel to provide the required training. JetBlue and AvPorts have complete access to PrimeFlight's training and other employee records. JetBlue supervisors regularly meet with PrimeFlight's management, including regular phone conferences and in-person meetings. JetBlue has conducted face to face meetings with PrimeFlight employees to discuss workplace concerns as well.

In light of the foregoing, the Regional Director's finding that the "level of control over [PrimeFlight] is no greater than the typical level of control between a service provider and a customer" is clearly inconsistent with the facts in the case. Accordingly the Board should grant review of the Regional Director's decision and find that the Railway Labor Act governs PrimeFlight and the NLRB does not have jurisdiction in this matter. In the alternative, the Board should refer the matter to the NMB for an advisory opinion.

For those reasons outlined above, the Employer respectfully requests that this Request for Review be granted.

Respectfully submitted,

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Dated: December 12, 2016

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CERTIFICATE OF SERVICE

I certify that on December 12, 2016, a copy of the foregoing Request for Review was *Electronically Filed* on the NLRB's website <http://www.nlr.gov>.

Also, I do hereby certify that a true and correct copy of the within Request for Review has been served on the following individuals by email this 12th day of December 2016: Sam Gonzalez at sgonzalez@1430ibew.com; Jordan El-Hag at jelhag@1430ibew.com; and, Audrey Eveillard (Hearing Officer) at Audrey.Eveillard@nlrb.gov

/s/ Christopher R. Coxson
Christopher R. Coxson, Attorney for Employer